MOBIL OIL CORP.

IBLA 81-153

Decided July 13, 1982

Appeal from decision of the Chief, Conservation Division, Geological Survey, affirming a decision of the Oil and Gas Supervisor, Gulf of Mexico Area, partially denying requests for refunds of overpayments of royalties. OCS-G 1440, OCS-G 2041, and OCS-G 2051.

Reversed in part, affirmed in part, and remanded.

1. Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

   The Board of Land Appeals will reverse a determination of the Geological Survey dismissing in part an appeal for failure to file timely an appeal within the time required by 30 CFR Part 290, from a letter denying refunds of alleged royalty overpayments in which no right of appeal was indicated, and which could not fairly be held to have put appellant on notice that a final determination with right of appeal was intended.

2. Oil and Gas Leases: Royalties -- Outer Continental Shelf Lands Act: Royalties: Excess Payments

   A request for refund, repayment, or crediting of excess payments against future payments due under 43 U.S.C. § 1339 (1976) must be made as the limitation in the statute provides, within 2 years from the date such excess payments are actually made.

3. Oil and Gas Leases: Royalties -- Outer Continental Shelf Lands Act: Refunds

   Where a Geological Survey audit revealing that a lessee has underpaid royalties on certain leases is challenged by the lessee

> who alleges that overpayments were also made on the same leases during the audit period, and where Geological Survey has assessed the lessee for the underpayments, but not considered the merits of the lessee's allegations with respect to overpayments, the case will be remanded to Geological Survey to determine whether offsets of payments would have been proper.

APPEARANCES: J. Berry St. John, Jr., Esq., and George J. Domas, Esq., New Orleans, Louisiana, for appellant; L. Poe Leggette, Esq., Office of the Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated September 29, 1980, by the Chief, Conservation Division, Geological Survey (Survey). The decision affirmed a decision of the Oil and Gas Supervisor (Supervisor), Gulf of Mexico Area, denying requests for refunds of alleged overpayments of royalties on leases OCS-G 2041 and OCS-G 2051, and partially allowing a refund on OCS-G 1440.

The controversy arises from an audit conducted by the Department in 1978. The purpose of the audit was to determine whether Mobil had paid the proper amount of royalties on natural gas production on the above leases during the period February 21, 1973, through December 31, 1978. According to the August 11, 1978, Memorandum Audit Report (Audit), Mobil had underpaid royalties on OCS-G 2041 in the sum of $7,272.61, for the period February 21, 1973, through November 30, 1975, and had underpaid royalties under lease OCS-G 2051 in sum of $15,854.69, for the period February 21, 1973, through December 31, 1977. The auditors also found that Mobil had overpaid royalties on OCS-G 1440 in the sum of $102,533. The Audit recommended that Survey assess Mobil the additional amounts found due for OCS-G 2041 and OCS-G 2051, and that Mobil be credited for overpayment against future royalties due.

By letter dated November 29, 1978, the Supervisor directed Mobil to pay the amounts found by the audit to be due. He suggested that Mobil apply for a refund under section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1976), submitting a schedule detailing the overpayments by month and verifying that Mobil had reimbursed its purchaser for the overcharge. 43 U.S.C. § 1339 (1976) provides:

> § 1339. Refunds; filing time limitation; certification of repayment; necessity of report to Congress
>
> (a) Subject to the provisions of subsection (b) of this section when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be

> repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.
>
> (b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: Provided, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress.
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> (Aug. 7, 1953, c. 345, § 10, 67 Stat. 469).

By letter of March 29, 1979, Mobil wrote Survey requesting refunds as follows:

Lease	Amount of Refund
OCS-G 1440	$120,933.00
OCS-G 2041	6,876.45
OCS-G 2051	127.80

The refund requested as to OCS-G 1440 was explained as follows:

> Deduction of the royalty overpayment on G-1440 was made from November 1978 through January 1979 production, as recovery of overpayment by Mobil's purchaser was made. Schedules and copies of the purchaser's statements were furnished with adjustments shown on November and December 1978 form 9-153. According to telephone conversation (Kallauner/Chumbley) Mobil should remit the amount recovered and apply for a refund. Our check dated March 25, 1979; therefore, includes an additional amount of $120,933.00.

In order to provide a proper focus of Mobil's request for refunds on the other two leases, reference must be had to the audit. It states in pertinent part:

> Mobil and Chevron Oil Company (Chevron) each own a fifty percent interest in OCS leases G-2041 and G-2051. Mobil paid

> Chevron's share of the royalties on these leases from the time production began, February 21, 1973, through November 30, 1975, when Chevron assumed its share of the royalty payment responsibility. During this period, Mobil understated Chevron's share of gas produced from G-2051 during June 1975 by 242,735 Mcf and from G-2041 during July 1975 by 161,775 Mcf. Consequently, this resulted in Chevron's royalty payments submitted to OCS Operations being undervalued by $10,964.71 and $7,272.61 for OCS leases G-2051 and G-2041, respectively. The underpayments of royalties were subsequently identified by Mobil which billed Chevron for the additional amounts. Chevron reimbursed Mobil for the billed amounts; however, Mobil never reported the errors to OCS Operations nor transmitted the additional royalties received from Chevron to OCS Operations.
>
> Mobil made an error in pricing 30,076 Mcf of gas produced from G-2051 during the last five days of July 1976. The gas, which qualified for upper tier pricing under FPC opinion 770A, was incorrectly reported to OCS Operations at the lower tier price. As a result, Mobil understated royalties due from G-2051 for July 1976 by $4,721.40.

(Audit at 2). Mobil's March 29, 1979, letter asserts with respect to OCS-G 2041 and OCS-G 2051:

> The audit indicates Chevron's royalty was underpaid by Mobil for $10,964.71 and $7,272.61 on leases G-2051 and G-2041 respectively. It is our understanding that when Chevron assumed its share of the royalty payment responsibility, they paid an additional $344,861.28 in royalties to account for the difference in Opinion 598 and Opinion 699 prices for the period July 1974 through January 1975. Attached schedules show our calculation of royalties paid for July 1974 through January 1975 which are in excess of the Opinion 598 rate. After deduction of the $10,964.71 on lease G-2051, Mobil is due royalty refund of $127.80, and with deduction of $7,272.61 on lease G-2041 Mobil is due $6,876.45.

By letter dated May 2, 1979, Mobil revised the amounts sought as refunds. It now requested $14,149.05 and $11,092.51 on OCS-G 2041 and OCS-G 2051, respectively. This request was denied in a letter dated June 12, 1979, by the Supervisor, wherein he stated in pertinent part:

> Mobil, as operator during the refund period of July 1974 through January 1975, had requested a refund for overpayment of Chevron's royalties on gas. The alleged overpayment had occurred due to Chevron's incorrectly pricing their gas in excess of the Federal Power Commission's Opinion 598 rate.
>
> Your request has been denied since the two-year statute of limitations of Section 10(a) of Public Law 212 has expired for the months in which you had requested a refund.

On June 18, 1979, the Supervisor again wrote Mobil, this time addressing lease OCS-G 1440. He said:

> Please refer to your letter of March 29, 1979, requesting a refund in the amount of $120,933.00 for overpayment of royalties on lease OCS-G 1440, East Cameron Blocks 9 and 14, offshore Louisiana.
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> The amount approved for refund by this office is $16,415.27, the remaining balance of $104,516.73 is outside of the two-year statute of limitations provided by Section 10 of the Outer Continental Shelf Lands Act (43 U.S.C. 1339(a)). The claim for the refund was separated as follows:
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> | | |
> |---|---|
> | June 1974 through March 1977 | $104,516.73 |
> | April 1977 through August 1978 | 16,416.27 |
> | | $120,933.00 |
>
> Your request for the eligible portion of the refund is being processed in accordance with Section 10 of Public Law 212, Outer Continental Shelf Lands Act.

By letter of August 20, 1979, the Supervisor requested Mobil, to "concur and/or comment" concerning Survey's approval of $16,416.27 as refund on OCS-G 1440. Mobil responded on September 21, 1979, asserting entitlement to the remaining $104,516.73 on OCS-G 1440 and renewing its request for refunds on OCS-G 2041 and OCS-G 2051. On November 5, 1979, the Supervisor issued a decision stating in pertinent part:

> Reference is made to Mobil's letter dated September 21, 1979, requesting a refund on leases OCS-G 1440, 2041, and 2051 in the amounts of $104,516.73, $14,149.05, and $11,092.51, respectively. These amounts were previously denied in Geological Survey's letters to Mobil dated June 12, 18, and August 20, 1979, as they were beyond the two-year statute of limitations as allowed in Public Law 212.
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> * * * * * * *
>
> Mobil was informed by our letter dated November 29, 1978, that as a result of a memorandum audit report prepared by the Department of Interior's Office of Audit and Investigation, gas royalties were overpaid. The overpayment of gas royalties was the result of erroneous application of various Federal Power Commission opinions. The certified letter of November 29, 1978, also states, "to obtain a refund you must apply for a refund in accordance with Section 10 of Public Law 212." Therefore, Mobil was informed of the two-year statute of limitations of the applicable Public Law. Thus, your request for refund dated September 21, 1979, for amounts previously disallowed because of

the two-year statute of limitations is again denied in compliance with Public Law 212.

Your request for the eligible portion of the refund for lease OCS-G 1440 in the amount of $16,416.27 is being processed in accordance with Section 10 of Public Law 212.

Mobil does have the right to appeal our decision in accordance with 30 CFR Part 290. If you have any further questions, contact Alan Anderson at extension 315.

Mobil timely appealed the Supervisor's decision. In his negative determination of that appeal, the Chief, Conservation Division held:

> Section 10 of the OCSLA, supra, not only requires that a refund of an overpayment be requested within 2 years of the date of the payment, it likewise limits the ability of the USGS to process a request for refund of an overpayment. Thus, to the extent that any requests for refund were made after the running of the 2 year period, Mobil's application was properly denied.
>
> The arguments made by Mobil in support of its appeal are not pertinent since the alleged overpayments under leases OCS-G 2051 and 2041 were discovered by Mobil and not by the auditors. The only overpayment discovered by the auditors pertains to a different lease as to which no deficiency was assessed.
>
> Moreover, under the regulations, a notice of appeal must be filed within 30 days after service of a decision or order (30 CFR 290.3). Since Mobil failed to file a timely appeal from the USGS June 12, 1979, letter denying the refunds as to leases OCS-G 2041 and 2051, it is now barred from challenging the propriety of that denial. Mesa Petroleum Co., 44 IBLA 165 (Nov. 30, 1979).
>
> The November 5, 1979, decision as corrected on December 13, 1979, [1/] is hereby affirmed.

The first issue presented is whether Mobil is precluded from challenging the denial of refunds on OCS-G 2041 and OCS-G 2051 because it failed to appeal the Supervisor's June 12, 1979, letter, supra, denying these claims on the basis of 43 U.S.C. § 1339 (1976).

Mobil argues that the June 12, as well as the June 18 letter were preliminary decisions and that Mobil's claims were reconsidered and finally disposed of in the Supervisor's November 5, 1979, decision. Mobil concedes that the June 12 letter bears the indicia of a final order. It points out, However, that the June 18 letter bears those same indicia with respect to OCS-G 1440. Mobil contends that Survey's subsequent actions, specifically its August 20 request that Mobil "concur and/or comment," demonstrates that

1/ On Dec. 13, 1979, the Supervisor had revised the allowable amount refundable on OCS-G 1440 to $18,341.79 and denied the balance of $102,591.21.

Survey did not consider the June 18 letter a final decision. It suggests also that if the Supervisor had intended the June 12 or June 18 letters to be final he could have so stated in his November 5 decision.

Survey contends that even if Mobil's September 21, 1979, letter were construed as a request for reconsideration on OCS-G 2041 and OCS-G 2051 such request was made after expiration of the appeal period beginning with the date on which Mobil received Survey's June 12 letter.

[1] The regulation at 30 CFR 290.3 provides the right to appeal to the Director, Survey, from an order or decision of Survey by filing a notice of appeal within 30 days of receipt of the order or decision. Section 290.1 states in part: "The rules and procedures set forth herein apply to appeals to the Director, Geological Survey * * * from final orders or decisions of officers of the Conservation Division * * *." (Emphasis supplied.) In section 290.2, the right of appeal is granted to "[a]ny party to a case adversely affected by a final order or decision of an officer of the Conservation Division." 2/ (Emphasis supplied.) If service of the June 12 letter began an appeal period, Mobil clearly failed to file any documents within it. As explained below, we think that the June 12 letter was not a final decision and triggered no appeal period. The correspondence between the parties, when viewed in its entirety, lends ample support to Mobil's position. There is indeed little difference in the tenor of the Supervisor's June 12 and June 18 letters. Both contain rulings barring claims for refunds on the basis of the statute of limitations (43 U.S.C. § 1339(a) (1976)), in clearly final terms, and neither advised Mobil of a right to appeal. Mobil did not respond to either letter. On August 20 the Supervisor, referring to his June 18 letter requested that Mobil concur and/or comment regarding Survey's decision to question a portion of the request for refund. The August 20 letter demonstrates that the Supervisor did not consider his June 18 letter to be a final determination. Therefore, to construe the June 12 letter as a final appealable determination while regarding the June 10 letter as an invitation for further discussion would be arbitrary and manifestly unfair to the lessee. To hold that the June 12 letter was a final decision would be to endorse the absurd argument that finality is not necessarily an element inherent in Survey's decisions but may be determined by actions subsequent to its decisions. Such reasoning would also ignore the Supervisor's November 5, 1979, decision, which denied the claims as to OCS-G 2041 and OCS-G 2051, not because Mobil had failed to timely challenge Survey's earlier rulings, but because of the operation of 43 U.S.C. § 1339 (1976). We conclude that Mobil is not barred from challenging the denial of refunds on these leases on the ground that it failed to appeal the June 12, 1979, letter. A contrary result would ignore the course of business between the parties, yield Survey an unfair procedural advantage, and possibly discourage the parties' willingness to discuss and resolve issues on a more informal level. Cf. Shell Oil Co., 52 IBLA 74 (1981). Mesa Petroleum Oil Co., 44 IBLA 165 (1979), cited in the decision appealed, is not directly pertinent. Finality was not an issue in that case; it was an uncontested circumstance, and the case simply held that where a

2/ The Conservation Division of the Survey has since been abolished and its functions have been assumed by the Minerals Management Service by Secretarial Order No. 3071 (47 FR 4751 (Feb. 2, 1982)).

notice of appeal was not filed within the 30-day period prescribed by 30 CFR 290, the appeal was properly dismissed. Thus, the decision appealed from is reversed insofar as it held that appellant failed to appeal timely Survey's June 12, 1979, letter. But cf. Robert B. Ferguson, 23 IBLA 29, 33-34 (1975) (where appellant recognized Survey's letter as its final decision, and filed notice of appeal). 3/

[2] The next question is whether Survey correctly denied Mobil's claims or parts thereof on the ground that such claims were barred by the statute of limitations in 43 U.S.C. § 1339 (1976).

Mobil asserts that Survey erroneously failed to consider overpayments made during the audit period and to offset those payments against underpayments. Mobil points out that when Survey refused to allow offsets, it paid underpayments totaling $18,237.31 on OCS-G 2041 and OCS-G 2051, and applied for a refund of $25,241.56 representing overpayments on those leases from July 1974 through January 1975.

Mobil states that since there were no underpayments on OCS-G 1440, it attempted to offset payments totaling $102,591.21 against future royalties due (Statement of Reasons at 13). Mobil asserts that after it verified that the overpayments on this lease were actually $120,933, it deducted these payments from the November 1978 through January 1979 royalty amounts. However, when Survey disallowed this procedure, Mobil paid $120,933 and applied for a refund for that amount (Statement of Reasons at 3-5; Mobil's letter of March 24, 1979). Mobil contends that while a refund may be barred by the statute of limitations, a credit is not. Mobil argues that it is entitled to credit against future royalty payments due for all overpayments made on all three leases. It requests oral argument before the Board indicating that it is prepared to prove overpayments made on OCS-G 2041 and OCS-G 2051 (Reply Brief at 13-14).

In his brief, the Solicitor accepts the figures by which Mobil proposed to set off its underpayments on OCS-G 2041 and OCS-G 2051 and concedes that Mobil was entitled to offsets on these leases under Shell Oil Co., supra. 4/ Thus, since the overpayments (according to Mobil's figures) were greater than the underpayments, Survey should not have received the $18,237.32 paid by Mobil. The Solicitor states Mobil is entitled to repayment of this amount but not to refunds of any net overpayment on OCS-G 2041 and OCS-G 2051 because of the statute of limitations (Brief at 13-25).

3/ The present case is also distinguishable from Pennzoil Oil and Gas, Inc., 61 IBLA 308 (1982), in which we upheld a Survey decision dismissing an appeal as untimely in accordance with 30 CFR 290.3(a). In that case Pennzoil also argued that certain "decisions" by Survey were not "final orders or decisions" within the meaning of 30 CFR 290.3(a). We stated, however: "The decisions bear all the indicia of a 'final' decision. They state that 'we hereby increase the royalty base for liquid production.' * * * The decision left nothing unresolved regarding computation of the royalty base and must be termed 'final.'" Id. at 310.

4/ The Solicitor notes that Survey has not verified these figures and is not bound by this stipulation.

In Shell Oil Co., supra, the Department's Inspector General audited payments 4 years after they were made. Shell had overpaid $11,470.87 in 1 month and underpaid $12,035.59 the next. Survey demanded that Shell pay the $12,000 and ruled that repayment of the $11,000 was barred by the 2-year limit. The Board reversed:

> Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey would have been correct in denying such request as untimely. In Phillips Petroleum Co., 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments.

Id. at 78. As Solicitor's Opinion M-36942, Refunds and Credits Under the Outer Continental Shelf Lands Act, 88 I.D. 1090 (1981), points out, "offsetting" is the crediting of overpayments against past payments due. Offsetting has nothing to do with refunds and is permissible within the auditing period, whether or not that period is within 2 years of the date of the audit. "Crediting" within the meaning of 43 U.S.C. § 1339(b) (1976), however, is crediting against future payments due and is governed by the 2-year limitation in the statute just as refunds and repayments are. 5/

[3] One distinction between Shell Oil Co., supra, and the case now before us is that in the latter overpayments on OCS-G 2041 and OCS-G 2051 were revealed not by the audit, but the lessee challenging the accuracy of

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5/ The Solicitor explains:

"Although Congress did not express itself with precision in sec. 10, its intention to place a two-year limit on requests for credits shows through clearly enough. Sec. 10(a) directs the Secretary to repay 'excess' payments, 'subject to the provisions of subsection (b) of this section.' Sec. 10(b) in turn refers to the 'refund of or credit for such excess payment.' This alone is strong evidence that both refunds and credits are 'repayments' under sec. 10(a). Additionally, the Senate report's discussion of sec. 10 says that sec. 10(b) imposes 'the additional requirement of notice to Congress in advance of repayment.' S. Rep. No. 411, 83rd Cong., 1st Sess. 26 (1953). If the Senate considered refunds and credits to be repayments under sec. 10(b), they must be repayments under Sec. 10(a). Only one point casts doubt on this conclusion: the use of the phrase 'such repayments' in the second sentence of sec. 10(a). In its context there the phrase refers solely to refunds drawn on the Treasury. I am satisfied, however, that the two-year limitation on repayments applies to credits as well as refunds. To say otherwise is to isolate the words 'such repayments' and to ignore Congress's purpose in adding sec. 10(b) to the Act. The Act is not a hermitage for a solitary phrase; it is a crowded house in which the sentences must live together." Id. at 1098-99 (footnote omitted).

that audit. Since Survey denied Mobil's claims on procedural grounds, it never considered the merits of the challenge and issued no determination as to the propriety of an offset within the audit (OCS-G 2041 and OCS-G 2051). If Mobil's allegations of overpayments on these leases are correct, we see no reason why the rationale of Shell Oil Co., supra, should not govern. The question then, is not whether the statute bars refunds or credits, but whether -- assuming overpayments occurred -- Survey should have recognized and offset these in the same audit period in which it discovered and assessed underpayment. The case will be remanded to allow Survey to make this determination with respect to OCS-G 2041 and OCS-G 2051.

With respect to refunds, repayments, or credits, the 2-year period in the statute applies and Shell Oil Co., supra, cannot be construed to circumvent its application. The purpose of the 2-year limit is to urge lessees to verify their accounts promptly and ascertain the correctness of payments made within the time provided. Phillips Petroleum Co., 39 IBLA 393 (1979). According to the Solicitor, the 2-year period may be extended in somes cases:

> [G]enerally speaking, when the lessee both has acted to verify his account within two years and has given the Department enough information to estimate the potential amount of the refund or credit. So interpreted, the statute still protects the budget planning process and limits the number of old claims to be reviewed. Yet it gives relief to the conscientious lessee.

Solicitor's Opinion M-3694, supra at 1102. The case before us reveals no circumstances which would warrant extension. Nor do we discern error in Survey's separation of the overpayment on OCS-G 1440 into refundable and nonrefundable portions based upon the years in which the payments were made. To afford a refund or credit for the cummulative amount claimed by Mobil would clearly be contrary to the statute. A lessee may recover overpayments only to the extent to which he files a claim therefor within 2 years of making the payments. See Solicitor's Opinion M-36942, supra at 1,104. The decision appealed properly limited Mobil's entitlement on OCS-G 1440 to $18,341.79.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, and the case remanded to Survey for further action consistent with the views expressed herein.

Gail M. Frazier
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the majority analysis, I wish to address, at greater length, an apparent misconception over the scope of our decision in Shell Oil Co., 52 IBLA 74 (1981). Appellant places considerable reliance on this decision in its brief. In Shell Oil Co., supra, we held that where an audit of past royalty payments from a lease was conducted and it was determined that in one month the lessee had overpaid royalties due by $11,470.87 and the next month the lessee had underpaid royalties due by $12,035.59, a request for the underpaid royalties was properly offset by those which had been overpaid. Thus, in Shell Oil Co., supra, the amount of royalty properly due was $564.72.

The Geological Survey had originally refused to "credit" the overpayments on the theory that section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) and (b) (1976), expressly prohibited refunds or credits for excess royalty payments unless a request therefor was filed within 2 years of the tender of the excess payment. In addressing this argument, we stated:

> Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey would have been correct in denying such request as untimely. In Phillips Petroleum Co., 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments.

Id. at 78.

Appellant argues that under the Board's Shell Oil decision so long as production continues on a lease, "the overpayment of royalties has consistently been, and should continue to be, treated as prepayment of future royalties." The majority correctly rejects this argument.

It is true that, in the past, Survey has permitted the offsetting of overpayments in one month by deductions from subsequent payments in future months. Our decision herein does not invalidate this practice. It does, however, properly limit it to the 2-year period mandated by 43 U.S.C. § 1339(a) (1976). In other words, where a lessee made royalty payments for any month in excess of that required by law, the excess may be deducted from future royalty payments provided that the excess payment occurred within 2 years of the future payment. Where, however, an excess payment has not been discovered within this 2-year period, such payment may not be recouped by diminution of future payments owing from production in the lease. Indeed, allowance of such deduction would be directly contrary to the 2-year

limitation on refunds which Congress has expressly imposed. 1/ Thus, the decision of Survey as regards lease OCS-G 1440 is correct.

Shell Oil merely stands for the proposition that, where the Government audits payments made more than 2 years earlier, the amount owed to the United States may be diminished by showing prior overpayments on the lease in question. The decision in Shell Oil was premised on the simple concept that since the Government was affirmatively attempting to gain compensation for past debts which had not been paid, it was proper to allow a lease to show that, in fact, the total amount owed the Government was less than the Government's request.

Thus, it would be conceivable that a lessee could show overpayments in excess of the total amount of underpayments for which the Government sought compensation. In such a situation, the Government would take nothing. Neither, however, would the lessee. The right to offset is necessarily limited to the amount sought by the Government. Offset claims which are in excess of the Government assessment for underpayment can neither be refunded nor credited against future payments of royalty where the excess payments occurred more than 2 years from the present. To allow such refund credits would equally defeat the purposes of 43 U.S.C. § 1339(a) (1976).

Therefore, even if appellant shows on remand that, with respect to OCS-G 2041 and OCS-G 2051, overpayments in excess of underpayments did occur such excess overpayments are lost to appellant. Its obligation was to monitor its own payments so as to prevent overpayments or discover them within 2 years. To the extent to which it has failed to do so, it must absorb the economic consequences. Moreover, I think it also clear that offsetting can be allowed only within the confines of each lease. If it is subsequently determined that excess overpayments exist for OCS-G 2041 such excess cannot be applied to cover any total underpayment which might be determined to exist for lease OCS-G 2051. Leases are assessed royalty on an individual basis and any offsetting must be similarly limited. I therefore concur with the decision of the majority.

James L. Burski
Administrative Judge

1/ Appellant argues, in effect, that the statute only applies where production from the lease has terminated. Appellant, however, fails to provide any support for this interpretation, and the majority quite properly refuses to adopt this crabbed construction of a relatively expansive statute.